Nos. 89-1433 and 89-1434

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Appellant,

—v.—

SHAWN D. EICHMAN, ET AL.,

Appellees.

UNITED STATES OF AMERICA,

Appellant,

—v.—

MARK JOHN HAGGERTY, ET AL.,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS
FOR THE DISTRICT OF COLUMBIA AND
THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF THE ASSOCIATION OF ART MUSEUM DIRECTORS, THE AUTHORS LEAGUE OF AMERICA, INC., ARTICLE 19 INTERNATIONAL CENTRE ON CENSORSHIP, BAY AREA COALITION AGAINST OPERATION "RESCUE," CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, CHICAGO ARTISTS' COALITION, THE

(for continuation of Amici see inside front cover)

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CHRISTIC INSTITUTE, CLERGY AND LAITY CONCERNED, COMMITTEE FOR ARTISTS' RIGHTS, COMMITTEE OF INTERNS AND RESIDENTS, COMMUNITY FOR CREATIVE NON-VIOLENCE, EMERGENCY COMMITTEE TO STOP THE FLAG AMENDMENT AND LAWS, FELLOWSHIP OF RECONCILIATION, THE FUND FOR FREE EXPRESSION, HUMANISTS OF WASHINGTON, ILLINOIS ARTS ALLIANCE, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, LAWYERS COMMITTEE ON NUCLEAR POLICY, MODERN LANGUAGE ASSOCIATION OF AMERICA, THE NATION INSTITUTE, THE NATIONAL CONFERENCE OF BLACK LAWYERS, THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE, NATIONAL LAWYERS GUILD, THE NEW YORK CRIMINAL BAR ASSOCIATION, NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, PEN AMERICAN CENTER, REFUSE & RESIST, THEATRE COMMUNICATIONS GROUP, THE UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), WABUN-ININI, ANISHINABE (a/k/a VERNON BELLECOURT) AS A REPRESENTATIVE OF THE AMERICAN INDIAN MOVEMENT, VIETNAM VETERANS AGAINST THE WAR ANTI-IMPERIALIST, WAR RESISTERS LEAGUE, WRITERS GUILD OF AMERICA, EAST, AND WRITERS GUILD OF AMERICA, WEST, AS AMICI CURIAE IN SUPPORT OF APPELLEES

QUESTION PRESENTED

Whether the Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(a), 103 Stat. 777, as applied to the expressive burning of a flag during an overtly political demonstration, violates the First Amendment to the United States Constitution.

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INTEREST OF THE *AMICI CURIAE*

This brief is submitted on behalf of thirty-four organizations, which include progressive political and civil rights groups, educational and artistic associations, lawyers' committees and associations, public interest law groups, labor unions and guilds, minority advocacy organizations, religious organizations, a community-based activist center, and an individual representative of the American Indian Movement. These organizations have a combined membership of well over 250,000 Americans.

Many of these organizations regularly engage in symbolic political expression and expression combining conduct and speech. All believe that symbolic speech is an important and proper medium for expressing messages of political and social significance. The American flag, as a preeminent symbol of this nation, is a particularly potent medium for conveying such expression.

The cases on appeal raise important issues concerning the scope of constitutional protection of symbolic expression. These organizations believe that any retreat from this Court's hitherto vigorous enforcement of the First Amendment would seriously impair their efforts to effect political and social change through the exercise of free speech.

This brief is filed pursuant to Rule 37.3 of the Rules of the Court. The parties have consented to its submission in letters filed herewith. Individual descriptions of the *amici* are set forth in the Appendix.

INTRODUCTORY STATEMENT

In *Texas v. Johnson*, 109 S. Ct. 2533 (1989), this Court was asked to decide whether the First Amendment would permit a state to punish those who desecrate the American flag as a form of political expression. The Court definitively concluded that such suppression is impermissible, declining to "create for the flag an exception to the joust of principles

protected by the First Amendment." *Id.* at 2546. Now, less than one year after *Johnson* was decided, the Government asks the Court to overrule its decision in that case.

Within days after the Court announced its decision in *Johnson*, both houses of Congress passed resolutions expressing disapproval. S. Res. 151, 101st Cong., 1st Sess. (approved June 22, 1989); H.R. Res. 186, 101st Cong., 1st Sess. (approved June 27, 1989). Within weeks, the Judiciary Committees of the Senate and the House convened hearings on possible responses to *Johnson*. *See Statutory and Constitutional Responses to the Supreme Court Decision in* Texas *v.* Johnson*: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) [hereinafter *House Hearings*]; *Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) [hereinafter *Senate Hearings*]. Bills were introduced to amend the existing federal flag-desecration statute, S. 1338, 101st Cong., 1st Sess. (1989); H.R. 2978, 101st Cong., 1st Sess. (1989), and joint resolutions were introduced proposing a constitutional amendment which would empower Congress and the States "to prohibit the physical desecration" of the flag, S.J. Res. 180, 101st Cong., 1st Sess. (1989); H.R.J. Res. 350, 101st Cong., 1st Sess. (1989).

Members of Congress stated repeatedly in hearings and floor debates that the purpose of an amendment, whether statutory or constitutional, was to overturn this Court's *Johnson* decision. *See, e.g.*, *Senate Hearings* at 2 ("The fact is, as a body, the U.S. Senate wants to see this opinion overturned.") (statement of Sen. Thurmond); *House Hearings* at 30 ("Our goal is to overturn *Texas v. Johnson*'s Supreme Court decision.") (statement of Rep. Michel).

Many in Congress were of the view that a constitutional amendment, rather than a statute, was necessary to circumvent *Johnson*. For example, Senator Dole stated, "I have come to the conclusion—regretfully—that a statute, rather

than a constitutional amendment, . . . will simply *not* guarantee the flag's safety from physical desecration." *Senate Hearings* at 384 (emphasis in original). The Administration took the same position: "[W]e believe that the only way to ensure protection of the Flag is through a constitutional amendment." *Id.* at 118 (letter of Atty. Gen. Thornburg). The Attorney General explained, "We think it is plain that even a statute prohibiting all Flag desecration would be unconstitutional under *Texas v. Johnson*." *Id.*[1] However, the proposal to amend the Constitution was defeated on its first vote in the Senate. 135 Cong. Rec. S13,733 (daily ed. Oct. 19, 1989).

The House and Senate bills, according to committee reports, both had as their purpose the protection of the flag's "physical integrity." S. Rep. No. 152, 101st Cong., 1st Sess. 2 (1989) [hereinafter *Senate Report*]; H.R. Rep. No. 231, 101st Cong., 1st Sess. 2 (1989) [hereinafter *House Report*]. The House Report asserted that "[t]his interest is 'unrelated to the suppression of free expression.' *United States v. O'Brien*, 391 U.S. 367, 377 (1968)." *House Report* at 2. Nevertheless, the House bill, H.R. 2978, expressly permitted burning and other means of disposing of worn or soiled flags. Moreover, after the bill's passage in the House, the Senate amended H.R. 2978 to include within its prohibition the maintenance of the flag on the floor or ground (without reference to any threat of physical harm), 135 Cong. Rec. S12,607-08 (daily ed. Oct. 4, 1989), and "physical defilement," which a proponent of the amendment defined as acts that do not threaten permanent harm to the flag's physical integrity but do "injur[e] the flag as a symbol of the United States," *id.* at S12,616 (daily ed. Oct. 4, 1989) (statement of Sen. Wilson). *See id.* at S12,616-19 (daily ed. Oct. 4, 1989)

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1 Former Judge Bork, a proponent of a constitutional amendment and a witness at the Senate hearings, contended that the very convening of the hearings "doomed" any attempt to overturn *Johnson* by statute: "At this very moment, we are making a record that the proposed statute is designed to evade the *Johnson* ruling, and that is enough to guarantee that the statute will be struck down." *Senate Hearings* at 102.

(introduced); *id.* at S12,654-55 (daily ed. Oct. 5, 1989) (approved).

As amended, H.R. 2978 was passed by both houses of Congress. 135 Cong. Rec. S12,655 (daily ed. Oct. 5, 1989); *id.* at H6997 (daily ed. Oct. 12, 1989). The President declined to sign the bill, but he allowed it to pass into law on October 28, 1989. In doing so he expressed "serious doubts that [the Act] can withstand Supreme Court review," Statement on the Flag Protection Act of 1989, 25 Weekly Comp. Pres. Doc. 1619 (Oct. 26, 1989), as had leaders in the House and Senate, *House Hearings* at 31 (Rep. Michel); *Senate Hearings* at 384 (Sen. Dole).

The Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777, was thus enacted as an amendment to the federal flag-desecration statute, 18 U.S.C. § 700.[2] As amended, the Act provides:

> Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.

18 U.S.C. § 700(a)(1). It further provides an exception from the Act's prohibition for "any conduct consisting of the disposal of the flag when it has become worn or soiled." *Id.* § 700(a)(2).

Because many members of Congress doubted that the Act could survive a constitutional challenge, the Act itself also provides for direct appeal to this Court "from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of subsection (a)," and directs that this Court shall "accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible." *Id.* § 700(d).

2 Prior to the amendment, the statute provided in part:

> Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

18 U.S.C. § 700(a) (1988).

These cases are on appeal from the dismissal of charges under the Flag Protection Act. In each of two cases, the district court determined that the Act is unconstitutional as applied to acts of flag-burning charged by the Government.

SUMMARY OF ARGUMENT

This Court has determined that acts of flag desecration are expressive conduct which implicate the First Amendment, that a law banning such conduct in order to protect the flag as a symbol is directly related to suppressing expression, and that such a law—purporting to protect the flag's symbolic value—cannot withstand this Court's strict scrutiny. *Texas v. Johnson*, 109 S. Ct. 2533, 2539-47 (1989).

In these cases, appellees are being prosecuted for their expression of political dissent through acts of flag-burning, conduct which the Government concedes is expressive. The Flag Protection Act specifically targets dissent involving flag desecration and, as the Government concedes, is thus directly related to suppressing expression. This Court's relatively relaxed, four-part standard of review for content-neutral laws burdening speech is accordingly inapplicable, *cf. United States v. O'Brien*, 391 U.S. 367, 377 (1968), and the Government does not suggest otherwise. Rather, as the Government acknowledged in the courts below, *Johnson* compels the conclusion that the Act is subject to strict scrutiny. Finally, because the purpose of the Act, like that of the Texas statute challenged in *Johnson*, is to protect the flag as a symbol, the Act cannot survive strict scrutiny.

The Government now advances two arguments, both of which fly in the face of the *Johnson* decision. First, it asks the Court to overrule *Johnson*'s determination that the First Amendment protects political statements expressed through acts of flag desecration. Second, it asks the Court to overrule *Johnson*'s holding that a law purporting to protect the flag as

a symbol by banning its desecration cannot survive strict scrutiny.

These contentions are fundamentally at odds with settled First Amendment principles and should be rejected out of hand. Both depend on one event, the passage of the Flag Protection Act, as the basis for overruling *Johnson*: first, the Act is said to show that disrespect of the flag is expression not worth protecting; second, the Act is said to show that the governmental interest in silencing disrespect for the flag has somehow suddenly become compelling. Both contentions are entirely without merit.

This Court should reaffirm its holding in *Johnson*. The Flag Protection Act takes aim at political dissent in order to advance one symbolic role for the flag. It serves no compelling governmental interest and is anything but narrowly tailored to serve any such interest. The Court should invalidate the Act as applied to appellees' expressive acts, and the district courts' decisions should be affirmed.

ARGUMENT

I. THIS COURT'S RULING IN *TEXAS V. JOHNSON* COMPELS THE CONCLUSION THAT THE FLAG PROTECTION ACT OF 1989 IS UNCONSTITUTIONAL.

A. Appellees' Flag-Burning Constitutes Expressive Conduct Protected by the First Amendment.

As was true in *Johnson*, appellees were arrested for burning the flag during political demonstrations, not for any contemporaneous verbal expression. In determining whether the First Amendment is applicable to their actions, the Court must determine whether appellees' burning of the flag, like Johnson's, constituted expressive conduct. *Texas v. Johnson*, 109 S. Ct. at 2538.

The Court has long recognized that non-verbal activity will be construed as "speech" under the First Amendment when

it is " 'sufficiently imbued with elements of communication.' " *Id.* at 2539 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam)). In reviewing specific actions—including flag-burning—for communicative elements sufficient to trigger First Amendment protections, the Court has asked "whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.' " *Id.* (quoting *Spence v. Washington*, 418 U.S. at 410-11).

Appellees' conduct easily satisfies this constitutional standard, as the Government is compelled to acknowledge. Appellant's Brief at 22. Appellees burned the flag during political protests that occurred in front of federal buildings, classic public fora. Like the *Johnson* flag-burning, which coincided with the convening of the Republican National Convention and was accompanied by the distribution of political leaflets critical of the United States, appellees' flag-burnings were "roughly simultaneous with and concededly triggered by," *Spence v. Washington*, 418 U.S. at 410, a specific political event (the enactment of the Flag Protection Act) and were accompanied by the distribution of literature expressly condemning that event and its implications.

Here, no less than in *Johnson* and *Spence*, "it would have been difficult for the great majority of citizens to miss the drift of [appellees'] point at the time that [they] made it." *Id.* As the district courts found, appellees' actions were "clearly intended to communicate a political message," 89-1434 J.S. App. 5a and appellees "succeeded dramatically in their attempt," 89-1433 J.S. App. 10a. These events—particularly when juxtaposed with the almost identical circumstances surrounding the concededly expressive flag-burning in *Johnson*—lead inexorably to the conclusion that appellees' acts of flag desecration constitute "expression of an idea through activity," *Spence v. Washington*, 418 U.S. at 411, and therefore implicate the First Amendment, *Texas v. Johnson*, 109 S. Ct. at 2540.

B. The Flag Protection Act Is Aimed at Suppressing Free Expression.

In contravention of the constitutional precept that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content," *Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972), the Government now seeks to imprison and fine any person who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States . . . ." 18 U.S.C. § 700(a)(1). While the House and Senate Reports characterize the Act's sole aim as protection of the flag's "physical integrity" and thus disavow any intent to suppress expression, *Senate Report* at 2, 10; *House Report* at 2, this Court's precedents instruct otherwise.

Where the government seeks to regulate expressive conduct, constitutional analysis of the regulation begins with the application of the four-part test announced in *United States v. O'Brien*, 391 U.S. 367 (1968):

> [A] government regulation [of expressive conduct] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; *if the governmental interest is unrelated to the suppression of free expression*; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377 (emphasis added). A law that satisfies each component of the *O'Brien* calculus is not analyzed as a primary abridgement of expression and thus need not meet the otherwise stringent requirements imposed by the First Amendment. However, the Flag Protection Act fails to meet the standard imposed by *O'Brien*'s third prong because it is directly "related to the suppression of free expression." *O'Brien*'s lenient standard thus is not implicated and the heightened First Amendment scrutiny typically applied to speech-suppressive legislation controls. *Texas v. Johnson*, 109 S. Ct. at 2542.

The Government concedes that the Flag Protection Act is speech-suppressive. Indeed, it agrees that suppression of the message implicit in desecrating the flag is "precisely the purpose of [the Act]." Appellant's Brief at 28-29. The Government has, therefore, abandoned any argument that *O'Brien* controls this case. *See* Appellant's Brief at 19 n.20.

Amicus Senator Joseph R. Biden, Jr., however, tracking the House and Senate Reports, attempts to distinguish the Act from the provision struck down in *Johnson*, arguing that the Act's proscriptions are not triggered by a flag-burner's particular viewpoint, are content-neutral, and thus must be analyzed under *O'Brien*. He attempts to shore up this argument by comparing the text of the Act to that of the Texas statute invalidated in *Johnson*. Unlike the Texas statute, which outlawed mistreatment of the flag "in a way the actor knows will seriously offend one or more persons likely to observe or discover his action," Tex. Penal Code Ann. § 42.09(b) (1989), the Act does not expressly condition punishment on the effect of flag-desecration on an observer. Senator Biden therefore takes the position that the Act is indifferent to the content of the particular message conveyed by an act of flag-destruction and is nothing more than a valid "time, place, or manner" restriction. *See* Brief for Senator Biden at 9-19; *see also Senate Report* at 10; *House Report* at 8-9.

Exclusive reliance on this textual distinction as a means of circumventing the Court's holding in *Johnson* ignores the Act's plain language and legislative history and misapprehends this Court's standard for "content-relatedness" as applied in *Johnson*. Because the Act is related to expression, the *O'Brien* test does not apply and the Act is subject to strict scrutiny—a standard it cannot meet.

1. The Language and Legislative History of the Act Plainly Reveal Its Speech-Suppressive Focus.

On its face, the Flag Protection Act is plainly directed at far more than its stated purpose of simply "protect[ing] the physical integrity of American flags," *House Report* at 2, 8; *accord Senate Report* at 2. The Act expressly permits destruction of the physical integrity of worn and soiled flags. 18 U.S.C. § 700(a)(2). On the other hand, the Act prohibits maintenance of a flag on a floor, although such disrespectful treatment often would better preserve the flag's physical integrity than, say, proudly flying it in high winds. *Id.* § 700(a)(1). The Act also punishes "physical defilement" of the flag, which, in contrast to "defacement," means to "injur[e] the flag as a symbol" without threatening its ongoing physical integrity. *Id.*; 135 Cong. Rec. S12,616 (daily ed. Oct. 4, 1989) (statement of Sen. Wilson). Thus, the Act obviously reaches beyond the flag's mere physical integrity to encompass as well the message it conveys.

This speech-suppressive focus is confirmed by the legislative history surrounding the statute's conception and enactment. Prior to the passage of the Act, the Senate and House Judiciary Committees heard extensive testimony from members of Congress and the Administration, and from "a broad range of constitutional scholars, constitutional historians, representatives of veterans' groups and individual veterans . . . ." *Senate Report* at 6. Virtually all of the testimony, and indeed the House and Senate Reports themselves, indicate that the Act's proponents were seeking to protect the flag as a symbol, not merely as a physical amalgam of dyes, threads, and cloth.[3]

3 *Accord Kime v. United States*, 459 U.S. 949, 953 (1982) (Brennan, J., dissenting from denial of certiorari) ("The Government has no esthetic or property interest in protecting a mere aggregation of stripes and stars for its own sake; the only basis for a governmental interest (if any) in protecting the flag is precisely the fact that the flag has substantive meaning as a political symbol."); *Spence v. Washington*, 418 U.S. at 421 (Rehnquist, J., dissenting) ("It is the character, not the cloth, of the flag which the State seeks to protect.").

In discussing the purpose of the Act, the Senate Report states that "the American flag has an historic and intangible value unlike any other symbol . . . [and] has come to be the visible embodiment of our Nation." *Senate Report* at 2. It alternately identifies that symbolic value by reference to the flag as "a proud and courageous symbol of our Nation's precious heritage," *id.* at 2, as representative of "all the rights and freedoms guaranteed under our Constitution," *id.* at 3, and as the "one symbol of the spirit of our democracy," *id.* at 5. Senators Hatch and Grassley made clear, however, in expressing their opposition to the statute, that the primary purpose even of a facially neutral statute was to "protect the flag as a symbol" by prohibiting "expressive conduct that physically desecrates the flag." *Id.* at 24.

The House Report confirms that the statute's aim is to protect the flag as a symbol. It states that the Act "recognizes the diverse and deeply held feelings of the vast majority of citizens for the flag, and reflects the government's power to honor those sentiments. . . ." *House Report* at 9. Quoting Professor Laurence H. Tribe, the Report further describes the law's purpose as "protect[ing] the flag *and what it represents* from needless and wanton destruction." *Id.* at 10 (emphasis added). A number of Congressmen candidly echoed these sentiments, stating that "[t]he Government's reason for passing [a statute which prohibits all flag destruction] would be precisely the same reasons it had for previously prohibiting contemptuous desecration: protection of the symbolic value of the flag." *Id.* at 17 (additional views of Rep. Sensenbrenner, Jr., *et al.*).[4]

4 Floor debate in both houses of Congress was similarly revealing. Representative Fish, in pressing his support for the Act, characterized the "implicit purpose" of flag-desecration laws as "patriotic in nature—to preserve the flag as a national symbol," 135 Cong. Rec. H5502 (daily ed. Sept. 12, 1989). Representative Florio, also a supporter of the legislation, analogized the burning of the flag to "trampling on the values for which the flag stands." *Id.* at H5511 (daily ed. Sept. 12, 1989). Senator Hatch, who assailed the proposed statute as unconstitutional and sought instead a constitutional amendment, stated that prohibiting flag-desecration protects "the flag as a symbol,

These statements, from committee reports and floor debates alike, illustrate that Congress's specific objective in passing the Flag Protection Act was to protect the values associated with the flag, not merely the textile embodying those values.

2. This Court's Recent Decisions Require that the Government's Interest in Protecting the Flag as a Symbol Be Regarded as Speech-Suppressive Even if that Symbol Is Deemed Ideologically Neutral.

The language and legislative history of the Act thus show that Congress passed the statute to protect the flag *as a symbol*. This Court's analysis in *Johnson* leaves no doubt that such an objective is " 'directly related to expression in the context of activity' " such as burning the flag amidst a political protest. *Texas v. Johnson*, 109 S. Ct. at 2542 (quoting *Spence v. Washington*, 418 U.S. at 414 n.8). Concerns for the flag's symbolic value, which flag desecration raises, "blossom only when a person's treatment of the flag communicates some message." *Id.*

Thus it was on the basis of the "governmental interest at stake," the flag's symbolic value, *id.* at 2540—independent of any offense to third parties—that the *Johnson* Court held the Texas statute to be related to expression and thus not subject to *O'Brien*'s less stringent test. *Id.* at 2542. This analysis applies with equal vitality in the present case and requires that the Flag Protection Act be subjected to this Court's most exacting scrutiny.

Johnson thus compels the conclusion that the Government's interest in the flag as a symbol of nationhood is one aimed at expression. However, even had *Johnson* not been

including against those who would desecrate the flag as part of a political expression," *id.* at S12,579 (daily ed. Oct. 4, 1989), while Senator Roth, a cosponsor of the legislation, stated that "when America's detractors violate our flag . . . they are insulting all who . . . believe so strongly in the values symbolized by the flag [and] they are assaulting those very values," *id.* at S12,584 (daily ed. Oct. 4, 1989).

decided, the same conclusion would flow from application of this Court's settled standard for determining whether a law is directed at suppressing expression, or only incidentally impairs it.

A law is content-based if the harm it seeks to avert arises as a consequence of the communicative content or impact of expression *See Boos v. Barry*, 485 U.S. 312, 320-21 (1988); L. Tribe, *American Constitutional Law* § 12-3 at 794-804 (2d ed. 1988).[5] Only when the challenged law "is '*justified* without reference to the content of the regulated speech,' " does the law qualify as "content-neutral," or unrelated to the suppression of speech. *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2754 (1989) (emphasis in original) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).[6] "The *government's purpose* is the controlling con-

5 As Justice Scalia has pointed out:

> Every proscription of expressive conduct struck down by the Supreme Court was aimed precisely at the communicative effect of the conduct. The only reason to ban the flying of a red flag (*Stromberg*) was the revolutionary sentiment that symbol expressed. . . . The only reason for singling out black armbands for a dress proscription (*Tinker*) was precisely their expressive content, allegedly causing classroom disruption. The only reason to prevent the attachment of symbols to the United States flag (*Spence*) was related to the communicative content of the flag.

Community for Creative Non-Violence v. Watt, 703 F.2d 586, 624-25 (D.C. Cir. 1983) (Scalia, J., dissenting) (footnotes omitted), *rev'd sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *see* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1497 (1975).

6 An example is a municipal regulation restricting sound amplification in a city park. Such a regulation is not aimed at the suppression of speech because the harm sought to be avoided—noise in sedate areas of the park and nearby residential areas—has nothing to do with the content of any message but, rather, with the noise pollution that is an incidental, non-communicative by-product of any message. *Ward v. Rock Against Racism*, 109 S. Ct. at 2754. Similarly, the governmental interest in the smooth administration of the draft, advanced to justify a rule prohibiting the burning of draft cards is unrelated to the sup-

sideration." *Ward* v. *Rock Against Racism*, 109 S. Ct. at 2754 (emphasis added).

Here, the Government's interest in preserving the flag as a symbol is plainly related to the suppression of expression. The harm to that interest which the Flag Protection Act seeks to avert—the weakening of the flag's symbolic value caused by acts of flag destruction—arises (if at all) only as a result of the message such acts of flag destruction are understood to communicate. Stated differently, the Act is justified only by reference to the affront to the symbol that an act of flag destruction conveys as its message.

Amicus Senator Biden argues that the Government's interest in the flag's symbolic value is unrelated to speech because it is advanced in an ideologically neutral manner. This argument is unavailing, for even if the Flag Protection Act could be considered "viewpoint neutral" in the sense that it forbids destruction of flags regardless of the discrete message sought to be conveyed by a particular flag desecrator, it is nevertheless "content-based" in that the Government's justification for suppression relies precisely upon the fact that acts of flag destruction, because they communicate, impair the flag's status as a symbol. *See Boos v. Barry*, 485 U.S. at 319-21 (ban on criticism of foreign governments near embassies, although viewpoint-neutral, is content-based because it is justified by reference to the content of speech).[7]

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pression of expression because the harm sought to be avoided—an inefficient draft—arises from noncommunicative consequences of draft card destruction and not from the anti-draft message thereby conveyed. *United States* v. *O'Brien*, 391 U.S. at 381-82.

7 Put otherwise, if laws banning flag destruction were not aimed specifically at the capacity of such conduct to communicate, it is difficult to fathom how such laws could protect the flag's integrity as a symbol. It is true that a particular exemplar of a flag, once destroyed, is no longer available to communicate any message. In that limited sense, an act of flag destruction, even if unwitnessed, would impair the capacity of that *particular* rectangle of cloth to continue to symbolize this nation. But surely no one is arguing that the Government has an interest in assuring that the precise number of flags available for display throughout the nation remains constant.

The same fallacy is embedded in attempts to analogize the defacement of national monuments such as the Lincoln Memorial. The supply of United States flags is unlimited, but there is only one government-owned, corporeal manifestation of the Lincoln Memorial. An appropriate analog to the Flag Protection Act is therefore a law prohibiting the defacement of postcards and miniature replicas of the Lincoln Memorial, as opposed to the Memorial itself. It hardly needs to be said that a law protecting postcards and replicas would be directed at the unfavorable message conveyed by their defacement, not at preserving the physical integrity of the paper and plastic on which images of the Memorial appeared.

In short, the Flag Protection Act "targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech," and it therefore "must be subjected to the most exacting scrutiny." *Id.* at 321; *cf. Ward v. Rock Against Racism*, 109 S. Ct. at 2754.

3. The Flag Protection Act, Because It Limits Expressive Uses of the Flag to Those that Communicate Messages Approved of by the Government, Is Not Ideologically Neutral.

The Flag Protection Act is content-based, even if it could be regarded as neutral in terms of viewpoint or ideology. But in fact the statute is ideologically biased at the most elementary level.

Our flag, like most potent symbols, may be employed to communicate myriad messages. All such messages, however, relate back in some way to the flag's central significance as "an emblem of National power and National honor." *Halter v. Nebraska*, 205 U.S. 34, 42 (1907). The Flag Protection Act quite plainly seeks to protect "National honor" by preventing use of the flag to communicate discordant, "unpatriotic" messages that are inconsistent with the messages most Americans associate with the flag. The Government acknowledges as much. *See* Appellant's Brief at 23 ("Flag burning is,

by its nature, a physical, violent assault on the most deeply shared experiences of the American people, including the sacrifices of our fellow citizens in defense of the nation and the preservation of liberty."); *id.* at 27-28 n.23. Unlike even the viewpoint-neutral restriction on the display of any and all signs critical of foreign governments which the Court found unconstitutional in *Boos v. Barry*, 485 U.S. at 319, the Flag Protection Act takes aim at the use of one symbol—a very particular symbol—to express views that do not meet with the Government's approval. This ideological bias alone, when used to justify a ban on expressive conduct, necessarily violates the crucial third prong of the *O'Brien* test.

This Court has long recognized the flag's position as the nation's central patriotic symbol.[8] There can be no question that the flag, standing as it does for honor and allegiance to the national government, is a political symbol of ideological force. That the flag as a symbol inspires deep affection, national pride, and mystical reverence renders it more ideological, not less so. The nature of the Government's interest in the flag is equally ideological. It is precisely because the flag is a symbol affirming faith in the nation that the Government asserts any interest in the flag's value.

Indeed, the same flag that is flown proudly over the United States Capitol to celebrate the principles embodied in the First Amendment might nevertheless be desecrated on the steps of the Capitol to protest a law violative of those principles. One need not applaud this latter form of expression to agree that the Flag Protection Act seeks nothing less than to reserve the flag's special symbolic power to express patriotic messages preferred by the Government. Such legislative sort-

8 In *Halter v. Nebraska*, 205 U.S. at 41, the Court described the flag as "the emblem of the American Republic . . . [f]or [which] . . . every true American has not simply an appreciation but a deep affection." The Chief Justice has more recently noted that "[t]he American flag . . . throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. . . . Millions and millions of Americans regard it with an almost mystical reverence . . . ." *Texas v. Johnson*, 109 S. Ct. at 2552 (Rehnquist, C.J., dissenting).

ing among preferred and disapproved messages is the very essence of viewpoint-based regulation. *See City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (First Amendment forbids regulating expression "in ways that favor some viewpoints or ideas at the expense of others"); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 67 (1976) (plurality opinion) (noting need for "absolute neutrality" by the government when regulating communication).

C. The Act Cannot Withstand Strict Scrutiny Because the Government Has No Compelling Interest in Prescribing One Symbolic Role for the Flag.

We have demonstrated that the Flag Protection Act is, at its core, aimed at the suppression of political expression. The only remaining question is whether the Act is constitutional despite this suppressive focus. In order to be constitutional the Act must survive this Court's strict scrutiny. We maintain that it does not and that it thus must be invalidated under this Court's First Amendment jurisprudence.

Once a law is shown to be aimed at the suppression of political expression of the type involved in this case, it must, "as a *content-based* restriction on *political speech* in a *public forum*, . . . be subjected to the most exacting scrutiny." *Boos v. Barry*, 485 U.S. at 321 (emphasis in original). Under this strict standard, such a law must be invalidated unless it can be shown to be narrowly tailored to serve a compelling governmental interest. *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1396 (1990); *Sable Communications v. FCC*, 109 S. Ct. 2829, 2836 (1989).

Johnson makes clear that laws seeking to protect the flag's symbolic value by prohibiting flag destruction do not serve a compelling interest under the First Amendment and therefore cannot survive strict scrutiny. *Texas v. Johnson*, 109 S. Ct. at 2542-48. While most Americans obviously find flag desecration repugnant, that alone could never be sufficient to justify the suppression of expression. As the Court recognized, "If there is a bedrock principle underlying the First Amendment,

it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 2544. Although the Government "has a legitimate interest in making efforts to 'preserv[e] the national flag as an unalloyed symbol of our country,' " *id.* at 2547 (quoting *Spence v. Washington*, 418 U.S. at 412), that interest has thrice before been rejected as a justification for bald abridgment of expression. *Id.* at 2544-48; *Spence v. Washington*, 418 U.S. at 412-14; *Street v. New York*, 394 U.S. at 593. The Constitution forbids the government from punishing the individual who expresses disrespect for national symbols, *id.*, just as it prohibits the state from forcing individuals "to confess by word or act their faith therein," *Board of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

To hold otherwise would truly invite a reorientation of the government's relationship to the citizenry. "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating . . . speech." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). Through the Flag Protection Act, the Government assumes the role of guardian of the public mind, seeking to insulate the flag as a venerated symbol. However important that aim may be to the Government, the Constitution forbids its invocation as a ground for silencing expression.

Moreover, the Government has failed to make any showing that the flag's status as a symbol is impaired by acts of flag desecration.[9] Its "almost talismanic reliance on the mere

9 The Government's failure to establish that nexus is a product of its confusion of the *concept* of the United States flag (*i.e.*, a design composed of fifty white stars on a blue background and thirteen red and white stripes) with discrete *physical renderings* of that concept. When we say the flag symbolizes nationhood, we recognize a long-standing association in the public mind between the design described above and this nation. But the symbolic equation of flag and country is not destroyed (or even threatened) by the destruction of an individual reproduction of that design. To revisit the example of a law banning defacement of a postcard of the Lincoln Memorial, *see* note 7 *supra*,

assertion of" such impairment, *Riley v. National Fed'n of the Blind*, 487 U.S. 781, ____, 108 S. Ct. 2667, 2674 (1988), cannot substitute for a demonstration of the actual nexus between asserted harm and regulated act which this Court demands. *See, e.g., Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 633-34 (1980).[10]

The Government, of course, through persuasion and example, can and does foster sentiments of national pride and unity. *Texas v. Johnson*, 109 S. Ct. at 2547. It may, for example, promote the flag by enacting precatory regulations regarding its proper treatment, *e.g.*, 36 U.S.C. §§ 173-177, by flying it on public grounds, by encouraging citizens to fly it at home, by schooling children in its history, and by setting apart a regular day for its observance. *See Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (noting that New Hampshire may disseminate ideology of state pride "in any number of" non-abridging ways); *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 97 (1977) (suggesting the less speech-restrictive alternatives of government-sponsored publicity and education). As Justice Brandeis wisely counseled in *Whitney v. California*, 274 U.S. 357, 377 (1920) (concurring opinion): "If there be time to . . . avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

The Government has adduced no evidence at all that the flag's symbolic capacity is endangered in the least by acts of flag desecration. Thus, even assuming that the Government did have a compelling interest in silencing those who would threaten the flag as a symbol, it has not made the slenderest of a showing that the Flag Protection Act is tailored to achieving that end. Indeed, the Government can only argue

such defacement no more impairs the meaning and value of the Memorial than does the desecration of a particular cloth or paper rendering of the flag impair our flag's power to symbolize this nation.

10 In fact, it seems more plausible that flag desecration reinforces in the public mind the connection between the flag as a physical object and its symbolic status.

that the Act does not impose an absolute ban on all forms of expressive conduct involving the flag. Appellant's Brief at 45. Thus, it effectively abandons any effort to meet this Court's strict scrutiny standard—a showing that the Act is not simply less than absolute in scope, but "narrowly tailored" to serve a compelling governmental interest. *Cf. Austin v. Michigan Chamber of Commerce*, 110 S. Ct. at 1398 (finding campaign financing regulation "precisely targeted" to achieve compelling state interest).[11]

II. THE GOVERNMENT'S SUGGESTION THAT *TEXAS V. JOHNSON* SHOULD BE OVERRULED IS WITHOUT MERIT.

A. There Is No Basis for Overruling *Johnson*'s Determination that Acts of Disrespect for the Flag Constitute Protected Expression.

Having recognized that the Flag Protection Act should not be analyzed under the less stringent *O'Brien* standard, the Government proceeds to argue that the Act should not be scrutinized at all insofar as it regulates acts of flag desecration (as distinguished from other forms of expression that might accompany such acts). Although the Government continues to assert that it can meet this Court's strict scrutiny standard—an assertion that we address in Part II.B *infra*—it also seeks to take these cases entirely outside the ambit of the First Amendment. This remarkable argument—which depends on the premise that "physical destruction of a flag of the United States falls outside the scope of protected expressive conduct under the First Amendment"—seeks nothing less than to reverse *Johnson* by fashioning a new category of unprotected speech. Appellant's Brief at 28; *see id.* at 24-25, 34 n.27, 40, 42-44.

11 We do not mean to suggest that a constitutionally valid flag-desecration statute could never be written. A statute prohibiting the desecration of the flag in a manner clearly " 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action,' " *Texas v. Johnson*, 109 S. Ct. at 2542 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)) would be perfectly consistent with this Court's holdings in *Johnson*, as well as with *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73 (1942), and *Brandenburg v. Ohio*, 395 U.S. at 448-49, and would presumably survive a constitutional challenge.

1. The Flag Protection Act Cannot Be Salvaged by Appeal to Unprotected Speech.

Much about the nature of the conduct at issue is not in dispute. The Government concedes that appellees' flag-burning constitutes expressive conduct that occurred in public fora as "part of organized political demonstrations—protests aimed at any number of current social and political issues." Appellant's Brief at 28. Nor is there any dispute that the Flag Protection Act is content-based. Appellant's Brief at 27-28 & n.23.

In the face of these inevitable concessions, the Government now takes the position that appellees' political expression is altogether outside the scope of the First Amendment. Appellant's Brief at 28. It seeks support for its tour de force from this Court's decisions identifying discrete categories of speech that are not entitled to absolute protection under all circumstances. Appellant's Brief at 30-32 (citing, for example, *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement of imminent lawless action); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words)).

The Government does not contend that appellees' expressive conduct falls into any of these existing categories.[12] Rather it attempts to draw a common rationale from these decisions and from commercial and labor relations precedents, *see* note 13 *infra*. The Government proposes a new three-part balancing test, by which it would withdraw First Amendment protections for a given class of expression whenever:

12 This Court's opinion in *Johnson* effectively precludes such an argument by rejecting the applicability of the two conceivably relevant classes of speech, incitement of imminent lawless action and fighting words. *Texas v. Johnson*, 109 S. Ct. at 2542 (citing *Brandenburg v. Ohio*, 395 U.S. 444; *Chaplinsky v. New Hampshire*, 315 U.S. 568).

> (1) the speech (or expressive conduct) is narrowly and precisely defined, (2) whatever value the expression may have to the speaker (or others) is outweighed by its demonstrable destructive effect on society as a whole or on particular overreaching social policies, . . . and (3) the speaker has suitable alternative means to express (and others have means to receive) whatever protected expression may be part of the intended message . . . .

Appellant's Brief at 33 (citations omitted).

2. The Government's Proposed Test for Determining Whether Speech Is Entitled to First Amendment Protection Is Unsupportable.

Settled First Amendment doctrine demonstrates how far afield the Government's proposed standard would take us.[13] To begin with, the Government would weigh the value of the regulated expression to the individual against its cost to society (although the manner of doing so remains unclear). As this Court has noted more than once, however, it is inappropriate for judges to attempt to weigh the "importance" of ideas before subjecting laws concerned with regulating speech to strict scrutiny. *See Employment Div. v. Smith*, 58 U.S.L.W. 4433, 4437 (U.S. Apr. 17, 1990). "The constitutional protection does not turn upon 'the truth, popularity,

13 Notwithstanding the assurance that its approach is not unprecedented, Appellant's Brief at 32, the decisions on which the Government principally relies for its proposed test involve commercial and other nonpolitical speech. Yet it purports to assess expression that is profoundly and undeniably political. *Cf. Texas v. Johnson*, 109 S. Ct. at 2543. Whereas political expression enjoys a "special status," situated as it is "at the core of the First Amendment," commercial speech is less rigorously protected. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 483 (1988) (O'Connor, J., dissenting). The very cases that the Government cites make this distinction quite plain. *See, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562-63, 564 n.6 (1980) ("The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-18 (1969) (distinguishing employer expression in the labor relations setting from expression in a political context).

or social utility of the ideas and beliefs which are offered,' " *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)), nor should it be limited in order to accommodate the majority's "dislike of a particular expression," *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988).

The Government's further innovation, a proposal that speech be made subject to regulation when "suitable alternative means" of expression are available, was specifically addressed and rejected by this Court in *Johnson*, just as it was " 'rejected summarily' " in *Spence. Texas v. Johnson*, 109 S. Ct. at 2546 n.11 (quoting *Spence v. Washington*, 418 U.S. at 411 n.4). These holdings were hardly novel. The Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 541 n.10 (1980); *see Schneider v. State*, 308 U.S. 147, 163 (1939).

The Government nevertheless implies that the recent holding in *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, is somehow inconsistent with these precedents, because the *Austin* Court sustained a campaign financing regulation that did not " 'impose an *absolute* ban on all forms of political spending but permit[ted] corporations to make independent political expenditures through separate segregated funds.' " Appellant's Brief at 34 n.27 (quoting *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. at 1398). In fact, the only inconsistency lies in the Government's proposal to test categories of expression generally with a standard properly applied to laws demonstrably supported by a compelling state interest. In particular, the Court in *Austin* identified a compelling interest—the prevention of actual or apparent corruption in the electoral process—and only then inquired whether the regulation was "sufficiently narrowly tailored," concluding that it was "precisely targeted to eliminate the distortion caused by corporate spending." 110 S. Ct. at 1398; *accord Sable Communications v. FCC*, 109 S. Ct. at 2836. In contrast, the Government's "alternative means anal-

ysis" on its face would apply to *any* discrete class of speech deemed socially unimportant. *See* Appellant's Brief at 33 & n.27.

These fundamental conceptual errors are compounded when the Government attempts to apply its test to appellees' acts of political protest. The Government never specifically explains how expression regulated by the Flag Protection Act is "narrowly and precisely defined" in accordance with the first prong of its three-part test. Instead, it submits in passing that "appellees' own conduct shows" that the Act is not vague. Appellant's Brief at 39 n.32. This contention is itself vague; surely the Government does not mean to argue that appellees must have been aware of the scope of the Act because they have been charged with violating it.[14]

Next, the Government seeks to weigh appellees' "expressive interests" against harm which it believes their expression will engender. It concludes, on the one hand, that appellees' expression "is 'no essential part of any exposition of ideas, and [is] of . . . slight social value as a step to truth,' " *id.* at 45 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. at 572) (Government's emphasis omitted), and, on the other hand, that the expression "goes beyond that level of decency, civility, and respect in discourse which merits constitutional protection," *id.* at 37 n.29.

We suggest that this Court's precedents compel a contrary conclusion. However strongly the Government may disagree with the symbolic message of appellees' flag-burning, it is a "bedrock principle" that the Government is without author-

14 In fact, the Act is neither precise nor narrow. It is unclear, for example, whether some, most, or all expressive conduct involving disrespect for the flag would violate the Act by "physically defil[ing]" the flag. No doubt the superimposition of a peace symbol made of black tape would physically defile the flag. *See Spence v. Washington*, 418 U.S. at 420-21 (Rehnquist, J., dissenting). So too would the sewing of a flag into the seat of one's pants. *See Smith v. Goguen*, 415 U.S. 566, 591 (1974) (Blackmun, J., dissenting). In the final analysis, it is difficult to imagine disrespectful conduct in any way relating to the flag in which a citizen could engage without fear of prosecution for physically defiling the flag, because "conduct" is by definition physical.

ity to write off such expression as wanting in social value and then to prohibit it. *Texas v. Johnson*, 109 S. Ct. at 2544. Even if an inquiry into the social value of expression were permissible, *but see Employment Div. v. Smith*, 58 U.S.L.W. at 4437, the Government is simply wrong in its conclusion that flag-burning as an act of political protest has no significance in the pursuit of truth. One need only recall, for example, that the current "national consensus" of pride and respect for the American flag to which the Government so often refers, *e.g.*, Appellant's Brief at 22, followed in the wake of an unknown man's act of flag-burning which was prosecuted in *Johnson*. The nation's response bears out this Court's prediction that "the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today." *Texas v. Johnson*, 109 S. Ct. at 2547. In Justice Jackson's enduring words, "[t]o believe that patriotism will not flourish" unless expression of dissent through the flag is stamped out "is to make an unflattering estimate of the appeal of our institutions to free minds." *Board of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

The Government also falls into error when it argues that appellees' political expression does not merit constitutional protection because it constitutes an assault on "basic human dignity" and it "goes beyond [a certain] level of decency, civility, and respect in discourse." Appellant's Brief at 37 & n.29. In the Government's view, "[t]hat is what *Chaplinsky* and the defamation cases are, at bottom, all about." *Id.*

That is not, we submit, what the First Amendment is all about. The imperative that "Congress shall make no law . . . abridging the freedom of speech," U.S. Const. amend. I, does not have, as its primary concern, the fostering of courtesy and endearment. On the contrary, "so long as the means are peaceful, the communication need not meet standards of acceptability." *Cohen v. California*, 403 U.S. 15, 25 (1971) (quotation marks and citation omitted). The First Amendment's protection encompasses the indecent, *Sable Communications v. FCC*, 109 S. Ct. at 2836, and extends to " 'vehement, caustic, and sometimes unpleasantly sharp

attacks.' " *Hustler Magazine v. Falwell*, 485 U.S. at 51 (quoting *New York Times Co. v. Sullivan*, 376 U.S. at 270). Notwithstanding the Government's urging to the contrary, *see* Appellant's Brief at 37, the First Amendment protects affronts to dignity, even in so potentially tense a setting as that of foreign diplomatic relations. *Boos v. Barry*, 485 U.S. at 321-24. The First Amendment requires toleration of offensive expression and even of affronts to dignity because a contrary rule would impinge on individual dignity at a more fundamental level—a level at which we, as participants in an "arena of public discussion," are free to choose what will be expressed. *Cohen v. California*, 403 U.S. at 24.[15]

Finally, the Government asserts that "Congress has left entirely in place abundant opportunities . . . [for] expressive conduct involving the flag," rather than imposing an absolute ban. Appellant's Brief at 45. The Government does not provide examples of the conduct that, in its view, falls outside the scope of the Act's prohibition.[16]

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15 We have found no more eloquent a statement of these founding principles than that of Justice Brandeis:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Whitney v. California, 274 U.S. at 375 (Brandeis, J., concurring) (footnote omitted).

16 As we have explained, there may well be no conduct at all involving disrespect for the flag that does not constitute at least a physical defilement for purposes of the Act; conduct is intrinsically physical. As a factual matter, then, it would appear that the Government is incorrect in asserting that the Act does not absolutely ban expressive conduct involving the flag, Appellant's Brief at 45.

That alternative channels for expression of disrespect remain open, assuming that they do, is simply immaterial. The Court has emphasized that the First Amendment's protection "is not dependent on the particular mode in which one chooses to express an idea." *Texas v. Johnson*, 109 S. Ct. at 2546. The reasoning underlying this well-established rule is simple: Although a narrowly drawn regulation may be permissible if it is unrelated to expression, a regulation such as the Act which is directed at expression cannot be salvaged merely on the ground that it is narrow. *See Ward v. Rock Against Racism*, 109 S. Ct. at 2758 (narrowly tailored regulation may be upheld "only if each activity within the proscription's scope is an appropriately targeted evil" (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988))).

We do not mean to suggest, of course, that the Act's absolute ban on expressive conduct is "narrow." Our point is that appellees' acts of flag-burning were indeed constitutionally protected expression. *Texas v. Johnson*, 109 S. Ct. at 2540. The Government could not take refuge behind the notion—even if it were true—that it is only banning a little bit of speech.

B. There Is No Basis for Overruling *Johnson*'s Holding that a Ban on Acts of Disrespect for the Flag Fails Strict Scrutiny.

The Government grudgingly acknowledges that flag-burning implicates the First Amendment, and asks this Court to reconsider that central teaching of *Texas v. Johnson*, 109 S. Ct. at 2540. Appellant's Brief at 42. It cites a single, intervening development in support of its request for reconsideration, namely, the passage of the Flag Protection Act. It then points out that this Court customarily pays deference to legislative judgments, particularly where Congress itself considered the question whether its act is constitutional. Appellant's

Brief at 21, 26-27 (citing *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981)). The Government contends that a "national consensus"[17] underlies the Flag Protection Act, a consensus reflecting a "compelling governmental interest in protecting the flag." Appellant's Brief at 27 & n.23. Noting that the *Johnson* Court arrived at its constitutional interpretation "without having the benefit of" this "legislative determination," the Government concludes that this Court should reconsider—and overrule—*Johnson* out of deference to Congress's determination. *Id.* at 44.

The implications of this bold assertion, if carried through, would fundamentally alter our system of government. The Government's argument apparently would require that the Court defer to Congress's judgment that its legislation is constitutional whenever (and indeed by virtue of the fact that) the law had won majority votes in both houses of Congress and had not been vetoed by the President. Moreover, to the extent that this Court's prior decisions conflicted with Congress's newly announced judgment, the Court would overrule them. The Constitution under such a theory would become nothing more than precatory language for Congress to consider. It is unclear what role this Court would have in such a system of constitutional adjudication beyond that of nullifying precedents inconsistent with Congress's current actions.

What is clear is that this is not our system of government. Former Judge Bork put the matter succinctly when he testified at the Senate hearings, "If Chief Justice Marshall's 1803 decision in *Marbury v. Madison* [5 U.S. (1 Cranch.) 137] means anything, it means you may not overturn a decision like [*Johnson*] by statute." *Senate Hearings* at 100. The individual liberty at stake in these cases is simply not a value that, under the Constitution, may be left to ebb and flow with the political tide of majoritarian sentiments:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Board of Educ. v. Barnette, 319 U.S. at 638.

Moreover, contrary to the Government's view, the passage of the Flag Protection Act adds nothing whatsoever to this Court's constitutional inquiry. Evidence of the governmental interest in protecting the flag was hardly "[a]bsent from the backdrop of *Texas v. Johnson*," Appellant's Brief at 27. The federal government as well as 48 of the 50 States had adopted flag desecration statutes, most of which have been in force through the greater part of this century. *Texas v. Johnson*, 109 S. Ct. at 2551-52 & n.1 (Rehnquist, C.J., dissenting). If the Flag Protection Act can be said to have introduced anything new to the constitutional debate, it might be the fresh fervor and passion with which acts of flag desecration, long outlawed, continue to be so; but this does not transform the Government's interest into a "compelling" one in any legal sense.

In fact, there is no legislative determination that would justify the short-circuiting of judicial review. As the Government acknowledges, Appellant's Brief at 26, it is this Court's "task in the end to decide whether Congress has violated the Constitution. This is particularly true where the legislature

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17 It cannot be argued that the putative "national consensus" reflects anything but a desire by Congress and the President to protect the flag. Specifically, there is no agreement among Congress and the President that the Flag Protection Act is constitutional. Congress so expected constitutional challenges that it provided for this Court's direct, expedited review of such challenges within the Act itself. 18 U.S.C. § 700(d). The President so doubted the Act's constitutionality that he declined to sign it. 25 Weekly Comp. Pres. Doc. at 1619-20. In fact, the Government concedes that, as each of the courts below determined, Congress failed in its effort to draft a content-neutral law. Appellant's Brief at 27-28 n.23. Thus, the Government would have this Court defer to Congress's judgment that the Act is constitutional, but would have it ignore Congress's reasoning. *See id.*

has concluded that its product does not violate the First Amendment." *Sable Communications v. FCC*, 109 S. Ct. at 2838.

Justice Kennedy's succinct statement in *Johnson* equally applies to these cases: "[W]e are presented with a clear and simple statute to be judged against a pure command of the Constitution. The outcome can be laid at no door but ours." *Texas v. Johnson*, 109 S. Ct. at 2548 (Kennedy, J., concurring). For if the outcome is laid elsewhere, in Chief Justice Marshall's words, "the constitution itself becomes a solemn mockery." *United States v. Peters*, 9 U.S. (5 Cranch.) 115, 136 (1809).

CONCLUSION

For the reasons set forth above, the orders of the district courts dismissing the charges against appellees should be affirmed.

Dated: New York, New York
May 3, 1990

Respectfully submitted,

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APPENDIX

Descriptions of Amici

The Association of Art Museum Directors (AAMD) is a national organization representing 150 directors of America's largest art museums. The AAMD believes in the protection of free expression and opposes any intent to undermine the First Amendment to the U.S. Constitution.

The Authors League of America, Inc. is a major national society of professional writers, representing the more than 14,500 author, dramatist, and journalist members of The Dramatists Guild, Inc. and The Authors Guild, Inc. One of the League's principal purposes is to express its members' views in cases involving fundamental questions of freedom of expression and to support that constitutional right.

ARTICLE 19 International Centre on Censorship, an international human rights organization based in London, was established in 1986 to defend the rights set out in Article 19 of the Universal Declaration of Human Rights including the right to seek, receive and impart information and ideas. ARTICLE 19 views the Flag Protection Act of 1989 as a retrenchment from free expression principles enshrined in United States law and tradition, and as unnecessary to "meet[ ] the just requirements of morality, public order and the general welfare" (under Article 29 of the Universal Declaration of Human Rights) in a democracy such as the United States.

The Bay Area Coalition Against Operation "Rescue" ("BACAOR") is a coalition of groups and individuals who are committed to defending women's rights and women's access to abortion services by keeping the clinics open during attempted Operation "Rescue" blockades, and by joining a national grassroots network of reproductive health care for all women. BACAOR has a vital interest in its freedom to carry out political work on controversial public issues, including direct and symbolic speech, without interference from the government.

California Attorneys for Criminal Justice (CACJ) is a statewide organization of approximately 2,200 attorneys whose practices emphasize the defense of individuals accused of crime. Since its founding CACJ and its members have been active in defending the First Amendment rights of individuals to free expression and free speech.

The Chicago Artists' Coalition is a non-profit service organization for visual artists with a membership of nearly 2,200 visual artists in the Chicago metropolitan area and nearly 1,000 more artists nationwide. The Coalition was founded in 1975 to educate the public regarding the value of the visual arts to society; to advocate for visual arts issues for its members and the arts community; to provide professional and educational services for artists and the arts community; and to improve the environment in which artists work and live. The CAC is committed to combatting the rising trend of censorship of artists and art organizations.

The Christic Institute is a public interest law firm and religious public policy center with a national network of 75,000 people. The Institute is dedicated to the objective of protecting the free and unrestricted expression by citizens of their religious, social and political views.

Clergy and Laity Concerned (CALC) is a national peace and justice organization of 24,000 members that was founded by Dr. Martin Luther King, Jr., Rabbi Abraham Joshua Heschel, Dr. William Sloan Coffin, Dr. John Bennet and Father Daniel Berrigan. CALC was formed as a vehicle to organize against the war in Vietnam.

The Committee for Artists' Rights (CFAR) was formed in 1988 to stem the growing trend of censorship in the arts. CFAR enlists over 1,200 artists, art supporters and art organizations in making a unified statement on the dangers of censorship imposed by any outside force, including government or small interest groups, for moral, ethical or political gains. Our position is that the right to freedom of speech exists for the health and well-being of our society. CFAR is

against any effort to censor, ban or outlaw symbolic speech whether it is verbal or visual.

The Committee of Interns and Residents (CIR) is a labor organization within the meanings of the national labor relations laws of the United States and the State of New York as well as other jurisdictions and represents 5,000 house staff officers (interns, residents and fellows) in hospitals and health care facilities in New York, New Jersey and Washington D.C. CIR's members often engage in demonstrative as well as verbal expressions of their views on professional, political and union-management affairs. They oppose any limitation by government on freedom of expression, symbolic or verbal, grounded on disagreement with its content or form.

The Community For Creative Non-Violence (CCNV) is an unincorporated association based in the District of Columbia that supplies food, shelter, and other assistance to homeless persons. Formed in 1970 in response to the war in Vietnam, CCNV has focused predominantly on poverty issues since 1976. There are 50 members of the community, many of whom were formerly homeless. On numerous occasions CCNV has conducted demonstrations to focus attention on the poor and often uses symbolic speech, in a wide variety of forms.

The Emergency Committee to Stop the Flag Amendment and Laws (formerly the Emergency Committee on the Supreme Court Flag-Burning Case) was formed when the Supreme Court accepted *Texas v. Johnson* in October 1988. Its members hold diverse views on flag-burning and political dissent; however, they all vehemently oppose the efforts by the government to legislate mandatory patriotism by enacting the Flag Protection Act or by threatening to amend the Bill of Rights. The Emergency Committee helped coordinate *amici* in *Texas v. Johnson* and in these cases. It submitted testimony to Congress in opposition to proposed statutory and constitutional amendments to circumvent *Texas v. Johnson*. The Emergency Committee has strongly supported these

defendants' open defiance of the Flag Protection Act in Seattle and Washington D.C., as well as the many flag-burnings involving thousands across the country, as a positive expression that all efforts to criminalize flag "desecration" and compel government-defined patriotism will be resisted.

The Fellowship of Reconciliation (FOR) is an international religious pacifist organization founded 74 years ago. FOR has 36,000 members. Throughout its history FOR has been concerned with the issues of freedom of speech and political persecution of citizens by their governments for the expression of political dissent.

The Fund for Free Expression was formed in 1975 by a group of authors, publishers, journalists and interested individuals to champion Article 19 of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on December 10, 1948. Article 19 guarantees "the right of people the world over to express themselves freely without fear of retribution, the right to hold opinions without inference and the right to seek, receive and impart information through any media regardless of frontiers." The Fund is the United States sponsor of *Index on Censorship*, an international journal of record that reports censorship problems all over the world. The Fund is also the United States sponsor and an organizing agency of ARTICLE 19, the newly created International Centre on Censorship based in London. The Fund is part of Human Rights Watch, which also includes the Africa Watch, Americas Watch, Asia Watch, Helsinki Watch and Middle East Watch Committees which monitor human right's practices in the specific areas of the world.

Humanists of Washington (HOW) is a statewide free thought association dedicated to the principles of Secular Humanism. It espouses a life-affirming, secular view of the universe built on a foundation of reason, science, and democracy. It supports intellectual freedom, free inquiry, critical thinking, and human compassion. HOW holds that a full range of civil rights for all people is necessary to achieve full

empowerment of the individual in society. This statement may not be endorsed in every detail by every member of HOW, but it does represent the collective ideas encompassed by the group.

The Illinois Arts Alliance supports public policy and legislation favorable to the arts in Illinois and the nation. The Alliance is supported totally through the contributions of its 1,000 individual and organizational members. In 1989, the Alliance publicly supported the right of the School of Art Institute of Chicago to display a student's work in which the U.S. flag was on the floor. Consequently, the Illinois General Assembly denied state funding to the Illinois Arts Alliance Foundation. The Alliance maintains that the decision of the School to display the flag was consistent with the fundamental freedom of speech and expression guaranteed by the First Amendment to the Constitution.

Lambda Legal Defense and Education Fund, Inc. (Lambda), founded in 1973, is the nation's oldest and largest legal advocacy organization working in support of the rights of lesbians and gay men. It has 10,000 active supporters. The protection of the rights to free speech and association is of utmost importance to Lambda's work and to the community it represents. The escalation of incidents of violence against lesbians and gay men and the AIDS epidemic have forced the gay and lesbian community to become more vocal in its attempts to achieve equal protection under the law. Lambda believes it must strive to protect its freedom of speech and association as a means of making its members' voices heard.

The Lawyers Committee On Nuclear Policy (LCNP), founded in 1981, is a national, non-profit educational association of 600 lawyers and legal scholars in 42 states and 11 foreign countries concerned with legal aspects of the nuclear weapons debate. LCNP supports the abolition of nuclear weapons through the promotion and strengthening of law and non-violent mechanisms for resolving international disputes, and believes that citizens have a fundamental right and

obligation to protest against government activity that the Committee perceives to be illegal.

The Modern Language Association of America (MLA) is a learned society. It was established in 1883 by scholars and teachers who sought a forum for scholarly exchange and a way of ensuring the effective teaching of English and other modern languages and literatures at a time when the modern languages—as opposed to classical Greek and Latin—were gaining a place in the school and college curricula. The membership has sustained the association's original commitment for over a century. The MLA has 32,000 members. They are primarily college and university professors of English and other modern languages as well as graduate students in these fields. The MLA has a long-standing commitment to the right of authors to free expression and the right of all people to read and interpret for themselves. In this context the MLA Executive Council thinks it important to protect the right to dissent.

The Nation Institute is a private, non-profit foundation which undertakes research, educational programs and other projects concerned with civil rights and civil liberties, particularly those protected by the First Amendment.

The National Conference of Black Lawyers (NCBL) is an activist organization of lawyers, law professors, judges, law students and legal workers dedicated to serving as the legal arm of the Black community. Since its founding in 1968, NCBL has been actively involved in the continuing struggle against racial discrimination and political repression. NCBL resolutely supports the right of individuals and groups to freely express themselves in speech—whether direct or symbolic.

The National Emergency Civil Liberties Committee, having 10,000 members, is an organization which since 1951 has been concerned with the protection of the constitutional rights of American citizens and persons residing in the United States. Its particular interest has been with the First Amend-

ment. In that connection, it has represented numerous individuals and organizations before this Court.

The National Lawyers Guild is an association of over 7,000 attorneys, law students, legal workers and jailhouse lawyers. The Lawyers Guild has been at the forefront of the effort to defend and expand the constitutional protection of First Amendment freedoms since its founding in 1937.

The New York Criminal Bar Association is an organization consisting of more than four hundred New York City attorneys, both in the private sector and in the public defender ranks, who are engaged in the practice of criminal law at the trial and appellate level. The Association is concerned with safeguarding the due process and First Amendment rights of attorneys at the defense bar, the clients whom those attorneys represent, and all persons whose civil or constitutional rights may be imperiled by private or governmental encroachment.

The New York State Association of Criminal Defense Lawyers is a statewide organization of lawyers with 750 members whose principal concern is the protection of the constitutional safeguards embodied in the Bill of Rights, including the First Amendment rights of criminal defendants and all other citizens.

PEN American Center is a nonpartisan, nonprofit organization of over 2,500 writers and an affiliate of International P.E.N., a worldwide association of poets, playwrights, essayists, editors and novelists. PEN works for the unhampered transmission of thought within every nation and between all nations and is opposed to all forms of suppression of freedom of expression in the countries and communities to which its members belong. Since 1960, American PEN has been fighting against restrictive laws, rules, regulations and practices that censor, curb or limit freedom of speech or expression in the United States.

Refuse & Resist (R&R) is a national organization which challenges the entire agenda of right-wing attacks and repression in the U.S. R&R opposes restrictions on abortion rights,

mass round-ups and detention of immigrants, increasing racism, homophobia, and all attempts to legislate morality. The R&R Statement of Unity, signed by over 1,000 people nationwide, says: "There can be no communality of purpose, healing of division, or coming together as one nation behind this new [reactionary] course. To acquiesce further in silence is to be complicit . . . ." R&R supports the right of people to express their dissent including by burning the American flag.

Theatre Communications Group is the national organization for the nonprofit professional theatre. Founded in 1961, its services and programs facilitate the work of thousands of actors, artistic and managing directors, designers, trustees and administrative personnel, as well as a constituency of more than 300 theatre institutions across the country. Central to TCG's mission is its fervent belief in freedom of expression for all artists.

The United Electrical, Radio and Machine Workers of America (UE) is a national labor organization committed to organizing workers regardless of craft, race, nationality, sex, age, religion, political belief, or immigration status and to representing and defending its membership in their efforts to improve their wages, working and living conditions. The UE has a proud history of fighting for the rights of all of its members, not only in the work place but in the courts and legislative arena as well.

Wabun-Inini, Anishinabe (a/k/a Vernon Bellecourt) is a representative of the American Indian Movement (AIM) which was formed to carry on the 500-year struggle for survival of the original and natural peoples of this land. He supports, on behalf of AIM, symbolic expression that is crucial for protest to be heard.

Vietnam Veterans Against the War Anti-Imperialist (VVAW AI) is the organization of veterans who initiated the "Festival of Defiance" in Seattle, Washington on October 28, 1989, where it announced its opposition to the Flag Protection Act of 1989 and where a member of its organization defied it by "napalming" 1,000 flags. Another member of

VVAW AI was one of the four people who challenged the law by burning flags on the steps of the Capitol in Washington, D.C. VVAW AI is opposed to the Flag Desecration Act of 1989 and to any attempts to amend the constitution to "protect" the flag.

The War Resisters League (WRL) was founded in 1923 as an organization committed to non-violence and to finding alternatives to war. It has 13,000 members. WRL rejects all use of organized violence in civil war, revolution, or in defense of the state, and has generally supported the ideas of Mahatma Gandhi and Dr. Martin Luther King, Jr.

The Writers Guild of America, East (WGAE) is a union of writers in screen and television, having over 3,200 members. The WGAE, which is affiliated with the AFL-CIO, believes in the protection of free expression and actively opposes attempts to weaken the First Amendment to the U.S. Constitution.

The Writers Guild of America, west is a union of writers in screen, television and radio, having over 7000 members. The Guild believes in the protection of free expression and actively opposes attempts to weaken the First Amendment to the U.S. Constitution.